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SOUTHERN DISTRICT OF CALIFORNIA

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DEPUTY

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

RUBEN DARIO GARCIA, JR.,  
CDCR # J-73373

Plaintiff,

vs.

D. STRAYHORN; J. LUNA; C.P. FRANCO;  
CAPTAIN K. REID; A. HERNANDEZ;  
JOHN/JANE DOES 1 - 5,

Defendants.

Civil No. 13-cv-0807 BEN (KSC))

**ORDER:**

**(1) DISMISSING CLAIMS AND  
DEFENDANTS FOR FAILING TO  
STATE A CLAIM PURSUANT TO 28  
U.S.C. §§ 1915(e)(2)(B) & 1915A(b);  
and**

**(2) DIRECTING U.S. MARSHAL TO  
EFFECT SERVICE OF SECOND  
AMENDED COMPLAINT ON  
REMAINING DEFENDANTS  
PURSUANT TO FED.R.Civ.P. 4(c)(3)  
& 28 U.S.C. § 1915(d)**

**I. Procedural History**

On April 3, 2013, Plaintiff, a state inmate currently incarcerated at the Richard J. Donovan Correctional Facility ("RJD") located in San Diego, California, and proceeding pro se, filed a civil rights Complaint pursuant to 42 U.S.C. § 1983. Plaintiff also filed a Motion to

1 Proceed *In Forma Pauperis* ("IFP") pursuant to 28 U.S.C. § 1915(a) (ECF No. 2.) Before the  
 2 Court could conduct the required sua sponte screening, Plaintiff filed his First Amended  
 3 Complaint ("FAC"). (ECF No. 3.)

4 On June 6, 2013, the Court granted Plaintiff's Motion to Proceed IFP and sua sponte  
 5 dismissed his First Amended Complaint for failing to state a claim pursuant to 28 U.S.C.  
 6 §§ 1915(e)(2)(B) & 1915A(b). (ECF No. 5 at 6-7.) Plaintiff was granted leave to file an  
 7 Amended Complaint in order to correct the deficiencies of pleading identified by the Court. *Id.*  
 8 On July 16, 2013, Plaintiff filed his Second Amended Complaint ("SAC"). (ECF No. 6.)

## 9 **II. SCREENING PURSUANT TO 28 U.S.C. §§ 1915(e)(2) & 1915A(b)**

10 As the Court stated in its previous Order, the Prison Litigation Reform Act ("PLRA")'s  
 11 amendments to 28 U.S.C. § 1915 obligate the Court to review complaints filed by all persons  
 12 proceeding IFP and by those, like Plaintiff, who are "incarcerated or detained in any facility  
 13 [and] accused of, sentenced for, or adjudicated delinquent for, violations of criminal law or the  
 14 terms or conditions of parole, probation, pretrial release, or diversionary program," "as soon as  
 15 practicable after docketing." *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A(b). Under these  
 16 provisions, the Court must sua sponte dismiss any prisoner civil action and all other IFP  
 17 complaints, or any portions thereof, which are frivolous, malicious, fail to state a claim, or which  
 18 seek damages from defendants who are immune. *See* 28 U.S.C. §§ 1915(e)(2)(B) and 1915A;  
 19 *Lopez v. Smith*, 203 F.3d 1122, 1126-27 (9th Cir. 2000) (en banc) (§ 1915(e)(2)); *Resnick v.*  
 20 *Hayes*, 213 F.3d 443, 446 n.1 (9th Cir. 2000) (§ 1915A).

21 To state a claim under § 1983, Plaintiff must allege that: (1) the conduct he complains  
 22 of was committed by a person acting under color of state law; and (2) that conduct violated a  
 23 right secured by the Constitution and laws of the United States. *Humphries v. County of Los*  
 24 *Angeles*, 554 F.3d 1170, 1184 (9th Cir. 2009) (citing *West v. Atkins*, 487 U.S. 42, 48 (1988)).

25 Plaintiff's Second Amended Complaint alleges that Defendants conspired, discriminated,  
 26 and retaliated against him for exercising his right to petition for redress through the California  
 27 Department of Corrections and Rehabilitation's inmate grievance procedures. First, to allege  
 28 a claim of conspiracy under § 1983, Plaintiff must allege facts with sufficient particularity to

1 show an agreement or a meeting of the minds to violate his constitutional rights. *Margolis v.*  
 2 *Ryan*, 140 F.3d 850, 853 (9th Cir. 1998); *Woodrum v. Woodward County*, 866 F.2d 1121, 1126  
 3 (9th Cir. 1989). Thus, pleading a conspiracy requires more than a conclusory allegation that  
 4 Defendants conspired to deprive Plaintiff's civil rights. The Ninth Circuit applies a heightened  
 5 pleading standard to conspiracy claims under section 1983 and has held that mere conclusory  
 6 allegations of conspiracy (i.e., bare allegations that a defendant "conspired" with another) are  
 7 insufficient to state a claim.<sup>1</sup> See *Harris*, 126 F.3d at 1195; *Buckey v. County of Los Angeles*,  
 8 968 F.2d 791, 794 (9th Cir. 1992). As currently pleaded, however, Plaintiff's conspiracy claims  
 9 amount to no more than "vague and conclusory allegations of official participation in civil rights  
 10 violations," and therefore fail to state a claim. See *Ivey v. Board of Regents*, 673 F.2d 266, 268  
 11 (9th Cir. 1982); *Aldabe v. Aldabe*, 616 F.2d 1089, 1092 (9th Cir. 1980) (conclusory allegations  
 12 of conspiracy insufficient to support a claim under section 1983 or section 1985).

13 Accordingly, because the Court previously informed Plaintiff of this deficiency in his  
 14 pleading, and Plaintiff has failed to correct the deficiency in his Second Amended Complaint,  
 15 Plaintiff's conspiracy claims against all named Defendants are dismissed from this action.

16 In addition, to the extent Plaintiff suggests generally that he is being "discriminated"  
 17 against or being treated differently than other prisoners, the "Equal Protection Clause of the  
 18 Fourteenth Amendment commands that no State shall 'deny to any person within its jurisdiction  
 19 the equal protection of the laws,' which is essentially a direction that all persons similarly  
 20 situated should be treated alike." *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432,  
 21 439 (1985); *Shaw v. Reno*, 509 U.S. 630 (1993). "The guarantee of equal protection [under the  
 22 Fifth Amendment] is not a source of substantive rights or liberties, but rather a right to be free  
 23 from invidious discrimination in statutory classifications and other governmental activity."

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24  
 25 <sup>1</sup> The Ninth Circuit has specifically held that conspiracy claims are subject to this heightened  
 26 pleading standard since they require the plaintiff to show that the defendant agreed to join the  
 27 conspiracy. See *Harris v. Roderick*, 126 F.3d 1189, 1195 (9th Cir. 1997); *Margolis*, 140 F.3d at 853;  
 28 *Mendocino Env't'l Ctr. v. Mendocino County*, 14 F.3d 457, 459 (9th Cir. 1994) (applying identical  
 standard to conspiracy claim in *Bivens* action). Although the Ninth Circuit eliminated the application  
 of a heightened pleading standard to all cases where an improper motive is an element, it did not modify  
 the requirement in regard to allegations of conspiracy. See *Galbraith v. County of Santa Clara*, 307 F.3d  
 1119 (9th Cir. 2002).

1 *Harris v. McRae*, 448 U.S. 297, 322 (1980) (citations omitted). However, conclusory allegations  
 2 of discrimination are insufficient to state a claim, unless Plaintiff alleges facts which may prove  
 3 invidious discriminatory intent. *Village of Arlington Heights v. Metropolitan Housing*  
 4 *Development Corp.*, 429 U.S. 252, 265 (1977). Therefore, to allege an equal protection  
 5 violation, Plaintiff must plead facts to show that each Defendant “acted in a discriminatory  
 6 manner and that the discrimination was intentional.” *FDIC. v. Henderson*, 940 F.2d 465, 471  
 7 (9th Cir. 1991) (citations omitted); *Reese v. Jefferson School Dist. No. 14J*, 208 F.3d 736, 740  
 8 (9th Cir. 2000). “‘Discriminatory purpose’ ... implies more than intent as volition or intent as  
 9 awareness of consequences. It implies that the decision maker ... selected or reaffirmed a  
 10 particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects  
 11 upon an identifiable group.” *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256,  
 12 279 (1979). “[P]urely conclusory allegations of alleged discrimination, with no concrete,  
 13 relevant particulars,” are simply insufficient. *Forsberg v. Pac. Northwest Bell Tel. Co.*, 840 F.2d  
 14 1409, 1419 (9th Cir. 1988). Here, Plaintiff fails to allege he is a member of a protected class and  
 15 he has failed to allege any “concrete, relevant” facts to show that he was treated differently with  
 16 a “discriminatory purpose.” *City of Cleburne*, 473 U.S. at 439; *Forsberg*, 840 F.3d at 1419;  
 17 *Feeney*, 442 U.S. at 279. Thus, Plaintiff’s equal protection allegations fail to state a claim upon  
 18 which relief can be granted.

19       Once again, Plaintiff also seeks to hold some of the Defendants liable in their supervisory  
 20 capacity. However, there is no respondeat superior liability under 42 U.S.C. § 1983. *Palmer v.*  
 21 *Sanderson*, 9 F.3d 1433, 1437-38 (9th Cir. 1993). Instead, “[t]he inquiry into causation must be  
 22 individualized and focus on the duties and responsibilities of each individual defendant whose  
 23 acts or omissions are alleged to have caused a constitutional deprivation.” *Leer v. Murphy*, 844  
 24 F.2d 628, 633 (9th Cir. 1988) (citing *Rizzo v. Goode*, 423 U.S. 362, 370-71 (1976)). In order  
 25 to avoid the respondeat superior bar, Plaintiff must allege personal acts by each individual  
 26 Defendant which have a direct causal connection to the constitutional violation at issue. *See*  
 27 *Sanders v. Kennedy*, 794 F.2d 478, 483 (9th Cir. 1986); *Taylor v. List*, 880 F.2d 1040, 1045 (9th  
 28 Cir. 1989). As a supervisor, a Defendant may only be held liable for the allegedly

1 unconstitutional violations of his subordinates if Plaintiff alleges specific facts which show: (1)  
 2 how or to what extent this supervisor personally participated in or directed Defendants' actions,  
 3 and (2) in either acting or failing to act, the supervisor was an actual and proximate cause of the  
 4 deprivation of his constitutional rights. *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir. 1978).  
 5 As currently pleaded, however, Plaintiff's Second Amended Complaint in no way sets forth facts  
 6 which might be liberally construed to support an individualized constitutional claim against  
 7 Defendants Franco, Reid, Hernandez or Seibel.

8 Therefore, the Court must dismiss all of Plaintiff's claims against Defendants Franco,  
 9 Reid, Hernandez and Seibel for failing to state a claim upon which relief can be granted.

10 While the Court does find that Plaintiff has adequately stated a retaliation claim against  
 11 Defendants Strayhorn and Luna, he has failed to allege a retaliation claim against Defendant  
 12 Stricklin. In order to properly allege a retaliation claim, Plaintiff must allege facts sufficient to  
 13 show that he was retaliated against for exercising his constitutional rights and that the alleged  
 14 retaliatory action "does not advance legitimate penological goals, such as preserving institutional  
 15 order and discipline." *Barnett v. Centoni*, 31 F.3d 813, 815-16 (9th Cir. 1994) (per curiam)  
 16 (citation omitted). Plaintiff must also allege facts sufficient to show that the defendants' actions  
 17 harmed him.<sup>2</sup> See *Rhodes v. Robinson*, 380 F.3d at 1131 ("Our cases, in short, are clear that any  
 18 retribution visited upon a prisoner due to his decision to engage in protected conduct is sufficient  
 19 to ground a claim of unlawful First Amendment retaliation--whether such detriment "chills" the  
 20 plaintiff's exercise of his First Amendment rights or not."); see also *Resnick*, 213 F.3d at 449;  
 21 *Hines v. Gomez*, 108 F.3d 265, 269 (9th Cir. 1997).

22 In a § 1983 matter, the Plaintiff must be able to show a causal connection between a  
 23 "defendant's retaliatory animus and subsequent injury in any sort of retaliation action." *Hartman*  
 24 *v. Moore*, 547 U.S. 250, 259 (2006). Here, Plaintiff's alleges only that Defendant Stricklin and  
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26 <sup>2</sup> "[A] retaliation claim may assert an injury *no more tangible* than a chilling effect on First  
 27 Amendment rights." *Gomez v. Vernon*, 255 F.3d 1118, 1127 (9th Cir.2001) (emphasis in original).  
 28 "Without alleging a chilling effect, a retaliation claim without allegation of other harm is not actionable."  
*Id.* Thus, while many plaintiffs alleging retaliation can show harm by pointing to the "chilling effect"  
 such acts may have had on the exercise of their First Amendment rights, "harms entirely independent  
 from a chilling effect can ground retaliation claims." *Rhodes v. Robinson*, 380 F.3d 1123, 1131 (9th Cir.  
 2004).

1 “Jhon/Jane Doe” approached him after he had been seen at the medical clinic and “informed  
2 [Plaintiff] that they were going to escort him to a secure area.” (ECF No. 6 at 9.) Defendant  
3 Stricklin and the unnamed officer “escorted Plaintiff to the Facility C Gymnasium” and placed  
4 him in a “cage under lock and key.” *Id.* The Second Amended Complaint is devoid of any facts  
5 linking the actions of Defendant Stricklin to Plaintiff’s exercise of his First Amendment rights.  
6 Accordingly, Plaintiff’s retaliation claims against Defendant Stricklin are dismissed for failure  
7 to state a claim upon which relief may be granted.

8 However, the Court does find that Plaintiff’s retaliation claims are now sufficiently  
9 pleaded as to Defendants Strayhorn and Luna to survive the sua sponte screening required by  
10 28 U.S.C. §§ 1915(e)(2) and 1915A(b). Therefore, Plaintiff is entitled to U.S. Marshal service  
11 on his behalf. *See Lopez*, 203 F.3d at 1126-27; 28 U.S.C. § 1915(d) (“The officers of the court  
12 shall issue and serve all process, and perform all duties in [IFP] cases.”); FED.R.CIV.P. 4(c)(3)  
13 (“[T]he court may order that service be made by a United States marshal or deputy marshal ...  
14 if the plaintiff is authorized to proceed *in forma pauperis* under 28 U.S.C. § 1915.”). Plaintiff  
15 is cautioned, however, that “the sua sponte screening and dismissal procedure is cumulative of,  
16 and not a substitute for, any subsequent Rule 12(b)(6) motion that [a defendant] may choose to  
17 bring.” *Teahan v. Wilhelm*, 481 F. Supp. 2d 1115, 1119 (S.D. Cal. 2007).

### 18 **III. CONCLUSION AND ORDER**

19 Good cause appearing, **IT IS HEREBY ORDERED:**

20 1. Plaintiff’s conspiracy and equal protection claims are **DISMISSED** from this  
21 action for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(b) and § 1915A(b).

22 2. All claims against Defendants Franco, Reid, Hernandez, Seibel and Stricklin are  
23 dismissed for failing to state a claim pursuant to 28 U.S.C. § 1915(e)(2)(b) and § 1915A(b). The  
24 Clerk of Court is directed to terminate these Defendants from the Court’s docket.

25 3. The Clerk shall issue a summons as to Plaintiff’s Second Amended Complaint  
26 (ECF No. 6) upon Defendants **Strayhorn** and **Luna** and shall forward it to Plaintiff along with  
27 a blank U.S. Marshal Form 285 for each Defendant. In addition, the Clerk shall provide Plaintiff  
28 with a certified copy of this Order, the Court’s Order granting Plaintiff leave to proceed IFP



(ECF No. 5), and certified copies of his Second Amended Complaint and the summons for purposes of serving each Defendant. Upon receipt of this "IFP Package," Plaintiff is directed to complete the Form 285s as completely and accurately as possible, and to return them to the United States Marshal according to the instructions provided by the Clerk in the letter accompanying his IFP package. Thereafter, the U.S. Marshal shall serve a copy of the Second Amended Complaint and summons upon each Defendant as directed by Plaintiff on each Form 285. All costs of service shall be advanced by the United States. *See* 28 U.S.C. § 1915(d); FED.R.Civ.P. 4(c)(3).

4. Defendants are thereafter **ORDERED** to reply to Plaintiff's Second Amended Complaint within the time provided by the applicable provisions of Federal Rule of Civil Procedure 12(a). *See* 42 U.S.C. § 1997e(g)(2) (while Defendants may occasionally be permitted to "waive the right to reply to any action brought by a prisoner confined in any jail, prison, or other correctional facility under section 1983," once the Court has conducted its sua sponte screening pursuant to 28 U.S.C. § 1915(e)(2) and § 1915A(b), and thus, has made a preliminary determination based on the face on the pleading alone that Plaintiff has a "reasonable opportunity to prevail on the merits," Defendants are required to respond).

5. Plaintiff shall serve upon Defendants or, if appearance has been entered by counsel, upon Defendants' counsel, a copy of every further pleading or other document submitted for consideration of the Court. Plaintiff shall include with the original paper to be filed with the Clerk of the Court a certificate stating the manner in which a true and correct copy of any document was served on Defendants, or counsel for Defendants, and the date of service. Any paper received by the Court which has not been filed with the Clerk or which fails to include a Certificate of Service will be disregarded.

**IT IS SO ORDERED.**

DATED: 9/21/13

  
**HON. ROGER T. BENITEZ**  
 United States District Judge